E. The Past Geographic Analysis Ignores Marketplace Realities

The Commission's previous decisions have been based on an inconsistent analysis of geographic markets. While the Commission has evaluated market share on an MSA wide basis, it has looked at facilities coverage on a wire center basis. This approach ignores how competitors make investment and entry decisions. If the competitor cannot obtain reasonably priced loop facilities throughout the geographic areas needed to achieve minimum viable scale it is unlikely to be able to enter any part of the market.

The Omaha experience serves as a prime example of the problems with the *Omaha Forbearance Order*'s geographic market analysis. Although the Commission only granted forbearance in 9 of Omaha's 24 wire centers, they were the 9 wire centers with the highest concentration of revenue opportunity. CLECs can still obtain UNEs in the other 15 wire centers, but the revenue opportunity in those markets would not allow it to recover the investments and expenses necessary to maintain its network that was designed and constructed to compete across the entire MSA, including the wire centers where the Commission granted forbearance. Accordingly, CLECs were forced to make a business decision to forego serving residential and small and medium business customers throughout the Omaha MSA.

F. The Omaha Test Does Not Identify Locations Where Competitors Have Facilities Available to Serve Customers

The *Omaha Forbearance Order* found that forbearance could be granted where a competitor "uses its own network, including its own loop facilities, through which it is willing and able, within a commercially reasonable time, to offer the full range of services that are substitutes for the incumbent LEC's local service offering" to at least 75 percent of end user locations in a wire center.[61] Rather than relying on *actual* geographic reach of facilities, this approach is speculative and engages in a predictive judgment as to whether a competitor may be "willing and able" to deliver substitute services "within a commercially reasonable time." Consistent with the D.C. Circuit's holding in *Verizon v. FCC*, a more reasonable standard is whether the competitor holds its services out as currently available to the relevant locations.

The current facts in Omaha debunk the prior predictive judgments used to justify deregulation before robust facilities-based competition is actually in place. While it is true that Cox has continued to extend its network facilities to more business locations in the Omaha MSA, it has done so on a very incremental basis. Accordingly, its limited network coverage is nowhere near the levels required for true wholesale competition to exist. Indeed, since McLeodUSA last filed data supporting its Petition for Modification of the *Omaha Forbearance Order* in 2007, Cox's network connectivity to business end user locations has not increased meaningfully beyond its prior reach. And, taking advantage of the absence of competitive pressure from Cox and the lack of competition from UNE-L CLECs in the business market, Qwest reportedly has instructed its sales agents not to present *any* competitive pricing offers (*i.e.* reduced pricing in exchange for entering a new term agreement) to business customers in the Omaha market, even to customers seeking to renew expiring customer-specific contract offers. Qwest's reported directive to its agents is compelling evidence that the grant of forbearance has eliminated competition in Omaha to the detriment of Omaha business customers, which is exactly what CLECs had themselves predicted in opposing the forbearance petition.

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[61] *Omaha Forbearance Order*, 20 FCC Rcd at 19444, ¶ 60 n.156.

It is now five years since the Commission predicted that Cox would expand its network to business locations, and it has not done so anywhere to the degree necessary to sustain a competitive market in Omaha in the absence of competition from UNE-based CLECs. Nor has Cox's presence in the market prompted Qwest to reduce the prices for wholesale alternatives to 251(c)(3) UNEs. The "commercially reasonable time" that the Commission used as its justification for its predictive judgment has come and gone.

III. THE COMMISSION SHOULD EMPLOY AN ANALYTICAL FRAMEWORK SIMILAR TO ITS TRADITIONAL MARKET POWER ANALYSIS

While the FCC previously found that it was not necessary to use its traditional market dominance analytical framework in evaluating UNE forbearance,[62] the failed Omaha experiment proves that a more nuanced analysis that focuses on specific product and geographic markets is warranted and the clear failure of the Commission's prediction for Omaha provides the necessary justification for departing from that unfortunate precedent. Further, the Commission has explicitly recognized "the strong relationship between the statutory forbearance criteria and the Commission's dominance analysis,"[63] particularly with regard to the statutory assessment of competitive conditions and the goal of protecting consumers through dominant carrier regulations. Specifically, the Commission acknowledged that "section 10(a)'s mandate to forbear for a 'telecommunications service, or class of ... telecommunications service' in any or some of a carrier's 'geographic markets' closely parallels the Commission's traditional approach under its dominance assessments."[64]

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62 *See Omaha Forbearance Order*, 20 FCC Rcd at 19425, ¶ 17 n.52.

63 *Anchorage Forbearance Order*, 22 FCC Rcd at 16318 ¶ 26.

64 *Omaha Forbearance Order*, 20 FCC Rcd at 19424 ¶ 17.

There should be no question that the Commission may adopt this market analysis for UNE forbearance petitions despite its previous reluctance. While the Commission recognized the differences between its statutory impairment analysis and a traditional market power analysis in the *Triennial Review Order*,,[65] those differences simply do not matter here. Here the Commission is not undertaking an impairment analysis.[66] If it were, it would certainly find, as it did in the *Triennial Review Remand Order* ("*TRRO*"), that competitors are impaired without loop and transport elements even where cable competitors can deploy their own loops, because of the historical advantages possessed by such companies compared to a reasonably efficient competitor.[67]

But, as the D.C. Circuit recognized,[68] these are forbearance petitions, not impairment decisions, and the text of the statutory forbearance criteria in Section 10(a)(1) requires the Commission to assess whether it can "ensure" that the Petitioner's "rates" will be "just," "reasonable" and "non-discriminatory" if the request for forbearance were granted. Because the focus of the statutory forbearance criteria involves analysis of the

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[65] Even in the *Triennial Review Order*, the Commission recognized that a market power analysis would be useful in the context of an impairment decision, to determine "whether an [ILEC] could raise its retail prices unchecked." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17051, ¶ 109 (2003) ("*TRO*"), aff'd in part, remanded in part, vacated in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir 2004) ("*USTA II*"), cert. denied sub nom. *Nat'l Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S Ct 313, 316, 345 (2004)..

[66] *Verizon Tel. Cos. v. FCC*, slip op. at 11.

[67] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order On Remand, 20 FCC Rcd 2533, 2644 ¶ 206 (2005), *aff'd sub nom. Covad Comm'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) ("*TRRO*").

[68] *Id.* at 6.

RBOC's "charges" and "practices" and whether they are "just and reasonable," it is logical for the Commission to employ a market power analysis to determine whether unbundling remains warranted. In the *Omaha Forbearance Order*, the Commission "recognize[d] the strong relationship between the statutory forbearance criteria" that "closely parallels" the Commission's market power analysis used in its dominance cases.[69]

Neither *Verizon v. FCC* nor *EarthLink v. FCC*[70] limits the FCC's discretion to incorporate a market power analysis in its forbearance analysis. While *EarthLink* held that "on its face" Section 10 "imposes no particular mode of market analysis,"[71] it also held that "the agency reasonably interpreted the statute to allow the forbearance analysis to vary depending on the circumstances."[72] Similarly the D.C. Circuit in *Verizon*, while finding fault with the Commission's analysis in the *Verizon Six-MSA Order*, specifically acknowledged that the FCC could revise its test as long as it provides a reasoned basis for doing so. This is consistent with the Supreme Court's explanation of the discretion available to the Commission in *FCC v. Fox Television Stations Inc.*,[73] where the Court held that the Commission need not demonstrate "to a court's satisfaction" that the new standard is "better" than the old one,[74] instead, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to

[69] *Omaha Forbearance Order*, 20 FCC Rcd at 19425 ¶ 17.

[70] 462 F.3d 1, 8, (D.C. Cir. 2006)

[71] *EarthLink*, 462 F.3d at 8.

[72] *Id.*

[73] 556 U.S. at ____, slip op. 10-11.

[74] *Id.* at 11.

be better."[75] In short, the Commission has ample discretion to "tailor the forbearance inquiry to the situation at hand."[76]

As explained in these Comments there are numerous sound reasons for revising the Commission's forbearance analysis: i) to respond to the Court's remand in *Verizon v. FCC* (and *Qwest v. FCC*); ii) to harmonize the forbearance analysis with the text of Section 10(a)(1); and iii) to improve the test to make sure that competition is not thwarted through premature deregulation, as occurred as result of the *Omaha Forbearance Order*.

In response to the D.C. Circuit's remand it is obvious that a more robust test that does not rely on market share alone is appropriate. Further, the Court's critique of the Commission's previous reliance on a per se market share test can be addressed, in part, with a more nuanced analysis that focuses on specific product and geographic markets, and considers other relevant factors, as discussed below, in addition to market share.

Antitrust law and other Commission precedent establish how the Commission should assess whether a carrier possesses market power. Market power is typically defined as a firm's ability to "exclude competition or control prices."[77] The law makes clear that the assessment of whether an ILEC has market power does not rest solely on market share, although high market share can be indicative of market power.[78] The Commission "has never viewed market share as an essential factor.[79]

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[75] *Id.* (emphasis in original).

[76] *EarthLink*, 462 F.3d at 9.

[77] *United States v. E.I. duPont Nemours & Co.*, 351 U.S. 377, 391 (1956).

[78] *See United States v. General Dynamics*, 415 U.S. 486, 498, (1974); *see also AT&T v. FCC*, 236 F.3d 729, 736 (D.C. Cir. 2001).

[79] *AT&T v. FCC*, 236 F.3d at 729.

Rather, as the Commission and the courts have explained, the Commission must make a broader inquiry.[80] The Commission's market power analysis typically considers demand and supply elasticities; that is, how consumers could substitute other services for the service in question, or how new entrants and existing competitors could add capacity to serve consumers that would seek alternatives to overpriced ILEC broadband. The Commission's traditional market power analysis focuses on (a) "identifying the relevant product and geographic markets;" (b) "identifying the market participants" and (c) determining whether the incumbent retains market power.[81]

A. Market Share Analysis

Market share is an important component of the Commission's market power analysis because it examines the level of concentration in a market, and "concentration in the relevant markets is one indicator" of the potential for anti-competitive conditions.[82] The Commission's UNE forbearance decisions have consistently focused on "facilities-based competitors.[83] This remains an important principle from which the Commission should not deviate.

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[80] *Id.* at 737.

[81] *Petition Pursuant to Section 10(c) of the Communications Act of 1934, as Amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, 14098 ¶ 24 (1998) ("*Comsat Non-Dominance Order*")..

[82] *See Echostar*, 17 FCC Rcd at 20614 ¶ 133.

[83] *Verizon Six-MSA Forbearance Order*, 23 FCC Rcd at 21312 ¶ 36 (finding Verizon not subject to sufficient level of facilities based competition.).

1. The Commission Should Require the Presence of Two Facilities Based Wireline Competitors Before Granting Forbearance

The presence of two competitors to the ILEC in a particular market is absolutely critical to avoiding the dangers of a duopoly which, for consumers and competition, is scarcely better than a monopoly. By incorporating a requirement that there be multiple facilities-based competitors in a market — in addition to the ILEC— the Commission can fix the flaw in its Omaha analysis that led to premature elimination of unbundling. As a result of the premature action in Omaha, the presence of a single competitor operating only in the retail market left the incumbent Qwest free to raise its rivals' costs and impede entry, eventually driving out competition to the detriment of consumers.

Furthermore, the Commission has found that a lone competitor with unique market access cannot ensure reasonable pricing. In the *TRRO*, the Commission clarified, and the D.C. Circuit affirmed, that the impairment analysis is to be conducted from the vantage point of a "reasonably efficient competitor". In other words, the Commission will allow unbundling only where the reasonably efficient competitor is impaired without access to UNEs.[84] The converse is that where a *reasonably efficient competitor* could compete to locations over its own facilities, then the Commission should not require unbundling.

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[84] When evaluating whether lack of access to an ILEC network element "poses a barrier or barriers to entry … that are likely to make entry into a market uneconomic," the FCC makes that determination with regard to a "reasonably efficient competitor." *TRRO*, 20 FCC Rcd at 3545-46, ¶ 22. Specifically, in analyzing entry from the perspective of the reasonably efficient competitor, the Commission "do[es] not attach weight to the individualized circumstances of the actual requesting carrier. Thus, we do not presume that a hypothetical entrant possesses any particular assets, … even if a specific competitive carrier in fact enjoys such advantages as a result of its unique circumstances." *Id.* at 2548, ¶ 26.

The Commission has squarely rejected BOC arguments that cable companies are the reasonably efficient hypothetical competitor envisioned under the impairment standard and determined that they are not. Instead, the FCC established that its impairment standard assumes no minimum set of network assets or capabilities.[85]

The Commission explicitly rejected BOC arguments seeking to preclude impairment in markets where cable competed because it recognized the significant advantages cable companies enjoy as a result of their existing customer base and their existing cable television infrastructure. Therefore, cable's presence in the cable modem market did not mean that new entrants were unimpaired, because cable companies "have not needed to overcome the same kinds of barriers as new entrants that start without any facilities at all."[86] The Commission explained that "[c]able telephony and cable modem service ... developed because cable operators have been able to overlay additional capabilities onto networks that they built for other purposes, often under government franchise, and therefore have first-mover advantages and scope economies not available to other new entrants, which lowers their incremental costs of providing the additional services."[87]

In analyzing whether to forbear from its unbundling rules, it would be inappropriate for the Commission to eliminate unbundling based entirely on deployment by a single competitor, the legacy cable operator, that possessed significant advantages in overcoming the barriers to entry faced by more typical entrants. In such cases, as in Omaha, the presence of competition from the legacy cable operator says nothing about the ability of

[85] *TRRO*, 20 FCC Rcd at 3545-46, ¶ 22.

[86] *TRO*, 18 FCC Rcd at 17046, ¶ 98.

[87] *Id.*

subsequent, reasonably efficient competitors — lacking cable's legacy advantages — to enter and compete successfully in the market in the absence of UNEs.

2. The Proposed Two-Competitor Test is a Reasonable Measure to Guard Against Dangers Inherent in Highly Concentrated Markets

The Commission's *Omaha Forbearance Order* assumed, in the face of enormous evidence otherwise, that competition from cable competitors alone would be sufficient to discipline monopolistic behavior in the absence of unbundling.

As an initial matter, requiring that there be two facilities based competitors to the ILEC is consistent with the Commission's determination in the Section 271 *Broadband Forbearance Order* that Section 10(a) does not require a perfectly competitive market. This proposal does not require a perfectly competitive market nor anything remotely close to it.

Under the horizontal merger guidelines, a market of three competitors is highly concentrated. The DOJ considers any market with an HHI above 1800 to be highly concentrated under the guidelines. Where the incumbent has 70% of the market and its two competitors each have 15%, the HHI would be $70^2 + 15^2 + 15^2 = 4900 + 225 + 225 = 5350$. Admittedly, this is an extreme case (in the real world, both competitors are unlikely to have exactly the same market shares), but even if the ILEC share were reduced to 60% or 50% the market would still be well above the threshold of a highly concentrated market.[88] The goal of the proposed market share analysis is not to identify a perfectly competitive market. It is instead, consistent with the purpose of Section 10, to identify when a market is competitive enough that the market opening measure of requiring the

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[88] Even at the other extreme, where each of three competitors had a 33% market share, the HHI would be $33^2 \times 3 = 3267$, which is still "highly concentrated."

ILEC to provide unbundled access to its network is no longer necessary to protect consumers against the harm of an unchecked monopoly. Consistent with this Commission's precedent, and settled law from the realm of antitrust, a duopoly does not provide that assurance. The analysis proposed in these Comments provides far more comfort that enduring competition has firmly taken root and that eliminating unbundling — and the competition reliant on unbundled access to the ILEC's legacy loop infrastructure — will not harm consumers.

By recognizing that forbearance from unbundling does not require a perfectly competitive market, the market power analysis is also consistent with *USTA II*, and the Commission's impairment rules adopted in the *TRRO*, in particular the need to take potential competition into account in its forbearance analysis. Adopting a framework that provides for the possibility of eliminating unbundling, even where markets are highly concentrated, is consistent with the D.C. Circuit's command that the Commission's impairment analysis account for potential competition even in geographic markets where competition is not yet fully developed, but the indicia of competition are similar to markets where more robust competition occurs.[89]

3. The FCC Should Limit the Analysis to Facilities-Based Competitors to the ILEC

Unlike the Commission's existing framework that includes purported competition from non-facilities based competitors such as resellers or UNE based competitors, and non-substitutable services such as wireless, the competitors' proposed standard rationally addresses competition from other wireline competitors, as only these competitors offer services that are substitutable for the services provided by the ILEC.

89 *See, e.g.*, *TRRO*, 20 FCC Rcd at 2558-60, ¶¶ 43-45; *USTA II*, 359 F.3d at 575.

The Commission's market share analysis should also focus on wireline competition because competition from wireless (whether fixed or mobile), satellite, and broadband over powerline is currently insignificant and not capable of disciplining the incentive of the two principal competitors to tend toward duopolistic behavior.[90]

4. The Commission's Market Power Analysis Should Give More Weight to Actual Than Potential Competition

While the plain language of Section 10 "imposes no particular mode of market analysis or level of geographic rigor,"[91] the market-dominance approach described herein should give more weight to actual competition than to potential competition. As noted by the D.C. Circuit, the Commission was not concerned with "whether CLECs had shown the capability for potential competition," but rather it "applied a market share-based approach that it used to determine whether to grant Verizon's request for forbearance from dominant carrier regulations."[92] Indeed, the Commission recognized that the "[m]ost important" factor in its competitive analysis was "successful" facilities-based competition.[93] As directed by the D.C. Circuit, the Commission should now explain why evidence of actual "successful" competition, *i.e.*, existing market share percentages, is properly given far greater weight in the Commission's UNE forbearance analysis than existence of potential competition.

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[90] We emphasize that this test is based on current marketplace realities, and is not intended to blind the Commission to technological change. If at some future time the Commission finds that competition from a non-wireline technology is sufficiently pervasive to impose real market discipline on ILEC pricing behavior, then it should modify the standard accordingly.

[91] *Verizon v. FCC*, at 11.

[92] *Verizon v. FCC*, at 11 citing *Verizon Six-MSA Order* at 21313, 21314, n.116

[93] *Verizon v. FCC*, at 13 citing *Verizon Six-MSA Order* at 21314.

Consistent with this approach, the market share analysis should be based on services the petitioner provides to retail customers and not inflated by including wholesale services provided to other carriers. Specifically, the market share of non-ILEC facilities-based competitors should not include carriers that use ILEC transmission facilities; *e.g.* special access, UNEs, commercial agreements, or resale. As discussed above, it is irrational to include resale-based competition under the umbrella of facilities-based competitors. Resale does not provide meaningful competition, as competitors have no ability to differentiate their products from those offered by the ILECs.

Nor should the Commission include UNE loop based competition or so-called "wholesale" UNE-P replacement services under the facilities based competitor umbrella. A competitor using a UNE-P replacement service is entirely at the RBOC's mercy. The RBOCs claim they have no regulatory duty to offer these services and can impose whatever rates, terms and conditions they decide are warranted. The record in the Omaha docket clearly demonstrates that these commercial agreements are "take it or leave offers" from the RBOCs. If so, the RBOCs can also withdraw these services whenever they deem it necessary. The Commission has held that "forbearance from application of section 251(c)(3) on the basis of competition that exists only due to section 251(c)(3) would undercut the very competition being used to justify the forbearance."[94] It would be illogical to eliminate UNE loop based competition in markets where the "competition" on which the decision is based comes from those very same loops.

[94] *Omaha Forbearance Order*, 20 FCC Rcd at 19450 ¶ 68 n.185.

a. Section 10 focuses on present day market realities

The text of the statutory forbearance criteria in Section 10(a)(1) requires the Commission to assess whether it can "ensure" that Qwest's "charges" and "practices" will be "just and reasonable" and not "unreasonably discriminatory" if the request for forbearance were granted. Because the focus of the statutory forbearance criteria involves analysis of the ILEC's "charges" and "practices" and whether they are "just and reasonable," it is logical for the Commission to employ a market power analysis to determine whether unbundling remains warranted. In the *Omaha Forbearance Order*, the Commission "recognize[d] the strong relationship between the statutory forbearance criteria" that "closely parallels" the Commission's market power analysis used in its dominance cases.[95] For example, the Commission's forbearance analysis in the *Omaha Forbearance Order*,[96] begins with an examination of the market and the allocation of market share between Qwest and Cox.[97]

As discussed in the *Omaha Forbearance Order*,[98] Section 10(a)(1) certainly provides a reasoned basis for the Commission to consider market power. This is especially appropriate for UNE forbearance, where the Commission's previous failure to apply a more "nuanced" analysis in the *Omaha Forbearance Order* has prompted competitors to exit the market rather than compete.[99]

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95 *Id.* at 19425, ¶ 17.

96 *Id.* at 19448-49, ¶¶ 66-67.

97 *Id.* at 19448, ¶ 66 (discussing Cox share of residential market in Omaha).

98 *Id.* at 19425, ¶ 17.

99 Letter from Andrew D. Lipman *et al.*, Counsel to Access Point, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 08-24 and 08-29, at 2 (filed April 23, 2009).

b. **Potential competition is already incorporated in the impairment standard and FCC should limit its weight**

Under the Commission's rules, "impairment" is determined by applying the standard set forth in Rule 317(b), which specifically states that impairment exists where:

> taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a *reasonably efficient competitor* uneconomic. (emphasis supplied).

In adopting Rule 317(b), the Commission explicitly rejected the argument that competition from cable operators alone demonstrates non-impairment. In the broadband market, for example, it found that cable companies "have not needed to overcome the same kinds of barriers as new entrants that start without any facilities at all."[100] The Commission emphasized that the impairment standard assumes no minimum set of network assets or capabilities.[101] Thus, its unbundling decisions took into account competition from cable companies but gave it little weight because it has little bearing on whether a reasonably efficient competitor, that lacks the built-in advantages of the cable provider, is impaired without access to UNEs.

As previously discussed in Section III.A.2 above, *USTA II* and the Commission's impairment rules adopted in the *TRRO* already take potential competition into account. Therefore, little weight, if any, should be given to potential competition in evaluating if Section 10 forbearance of a UNE obligation is appropriate.

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[100] *TRO*, 18 FCC Rcd at 17384, ¶ 98.

[101] *TRRO*, 20 FCC Rcd at 3545-46, ¶ 22.

Potential competition is also addressed in the examination of supply elasticity and entry barriers and thus a separate analysis would be superfluous.

B. The Commission Should Consider Supply Elasticity

As noted above, market power analysis must look beyond market share to consider both supply and demand elasticities.[102] Supply elasticity "refers to the ability of suppliers in a given market to increase the quantity of service supplied in response to an increase in price."[103] The Commission examines supply elasticity to "determine the ability of alternative suppliers in a relevant market to absorb a carrier's customers if such a carrier raised the price of its service by a small but significant amount and its customers wished to change carriers in response."[104] The Commission examines two factors in assessing supply elasticity, first the "supply capacity of existing competitors" — in other words whether competitors "have or can relatively easily acquire significant additional capacity" — and second, "entry barriers" that indicate whether new competitors can easily enter the market even where existing competitors lack spare capacity.[105] Where entry barriers are low, supply elasticity is high, which in turn suggests the market is competitive.

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[102] *See, e.g., United States v. General Dynamics*, 415 U.S. at 498.

[103] *Comsat Non-Dominance Order*, 13 FCC Rcd at 14123 ¶ 78.

[104] *Id.*

[105] *Motion of AT&T to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293 ¶ 38 (1995) ("*AT&T Non-Dominance Order*").

1. Ability To Add "Significant Additional Capacity"

Supply elasticities tend to be high if existing competitors have or can easily acquire significant additional capacity in a relatively short time period.[106] The cost structure of the facilities-based local telecommunications market, however, is marked by the pervasive fixed and sunk costs and economies of density and scale necessary to compete and serve customers in local markets. Serving local telecommunications markets requires significant investments in infrastructure, particularly in last mile facilities to bring services to business and residences. Given this complex economic backdrop, RBOC claims regarding their competitors' ability to add significant additional capacity in a short time period, must be carefully scrutinized. The Commission should not consider generalized claims and anecdotal evidence that facilities-based wireline competitors have the ability to rapidly add significant capacity.

2. Ability to Overcome Entry Barriers

The Commission examines entry barriers to determine whether a new entrant could efficiently enter the market and begin serving customers fleeing the incumbent's service, if the incumbent raised its prices above a certain threshold. Indeed, one of the fundamental reasons Joint CLECs have an interest in this proceeding is because they know that high entry barriers preclude competitors from deploying their own loops to most customers, and require UNE loops to reach the vast majority of their customers. The Commission has found that deployment of loops is a "costly and time consuming"

[106] *Motion of AT&T Corp. to be Declared Non-Dominant for International* Services, Order, 11 FCC Rcd 17963, 17980-1 ¶ 48 (1996) ("*AT&T International Non-Dominance Order*").

undertaking.[107] The lack of a robust third pipe further confirms the high entry barriers in deploying last mile facilities.

Entry barriers are high in the local exchange market despite the entry of cable competitors into the residential market. Competitive entry by cable providers, who have unique access to customer premises, is not predictive of potential entry by other sellers.[108]

C. The Commission Should Consider Demand Elasticity.

Demand elasticity refers to "the willingness and ability" of ILEC "customers to switch to another ... service provider or otherwise change the amount of services they purchase ... in response to a change in the price or quality of ... service."[109] High demand elasticity indicates that the incumbent's customers are willing and able to switch to a competitor in order to obtain a better price or better service, and that the market is subject to competition.[110] Competitors have provided the Commission with evidence that switching providers can be problematic, particularly in the business market where the incumbents lock customers into long term contracts with steep termination penalties thus

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[107] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17107 ¶ 205 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003) *vacated in part, remanded in part on other grounds, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[108] This is especially true since standard cable plant used to serve residential customers is based on coaxial cable, which is not a viable substitute for the dedicated high capacity broadband connectivity demanded in the business market.

[109] *Comsat Non-Dominance Order*, 13 FCC Rcd at 14120 ¶ 71.

[110] *See id.*

requiring high costs to change providers.[111] These high costs of changing make it less likely that consumers faced with anticompetitive pricing or practices would choose another competitor.[112]

IV. THE FCC SHOULD EXAMINE COMPETITION IN DISCRETE PRODUCT AND GEOGRAPHIC MARKETS

As discussed above, the Commission's previous UNE forbearance standard improperly conflates product markets, particularly the residential and business markets, and utterly ignores the need for separate evaluation of wholesale and retail markets. Further, the Commission should clarify that the MSA is the basic geographic market to be analyzed.

A. Product Markets Must Be Defined Based on Sound Economic Criteria

The Commission, consistent with recognized principles of antitrust law, determines appropriate product markets in a competition analysis. It makes its assessment of the appropriate product markets "from the perspective of customer demand."[113] The Commission has typically recognized that "competition depends on consumers having choices between products that are fairly good substitutes for each other."[114] In markets where such choices exist "a single provider cannot raise its prices above a competitive level because consumers will switch to a substitute."[115]

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[111] *See e.g., id.* at 14121 ¶ 73 (suggesting presence of large volume of long term contracts would indicate low demand elasticity.)

[112] *AT&T Reply Comments*, WC Docket 04-36, at 43 (filed July 14, 2004).

[113] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18336 ¶ 83 (2005) ("*SBC/AT&T Merger Order*").

[114] *Echostar*, 17 FCC Rcd at 20603 ¶ 97.

[115] *Id.*

Under these principles, a specific service or specific set of services represents a distinct product market if a hypothetical monopoly provider of those specific services could profitably sustain a nontransient, nontrivial price increase — that is, if the monopolist's profits after the price increase would exceed the monopolist's profits before the price increase.[116] If the price increase caused enough buyers to shift their purchases to a second product to render the increase unprofitable, then the second product should be considered to be part of the same product market. Moreover, absent a quantitative determination of whether two services are part of the same product market, courts have generally included products in the same market if they are "reasonably interchangeable" in their use.[117] Thus where "one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market."[118]

The Commission has previously determined that wholesale and retail markets for wireline services constituted separate product markets.[119] It has also separately analyzed competition in residential and business markets.[120] It has recognized the substantial

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[116] 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, at 20,572 § 1.0 (defining the relevant product market as "a product or group of products such that a hypothetical profit maximizing firm that was the only present and future seller of those products ('monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price").

[117] *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962).

[118] *Echostar*, 17 FCC Rcd at 20606 ¶ 106.

[119] *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5676-79, ¶¶ 27-33 (2007) ("*AT&T/BellSouth Merger Order*");*SBC/AT&T Merger Order*, 20 FCC Rcd at 18304-21, ¶¶ 24-55; *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18447-63, ¶¶ 24-55 (2005) ("*Verizon/MCI Merger Order*").

[120] *See, generally, TRO.*

differences in the services demanded by business customers and residential customers.[121] As the Commission recognized, "bandwidth, security and other technical limitations" render cable modem service an "imperfect substitute" for services competitors typically provide to business customers using UNE loops.[122] It has also separately addressed business and residential markets in its review of RBOC mergers.[123]

1. Separate Analyses of Wholesale and Retail Competition

Under the market power framework proposed in these Comments, the Commission should separately assess whether wireline competitors that have deployed their own loop facilities offer *wholesale substitutes* for the specific network elements available under the Commission's rules — namely DS0 loops, dry copper loops (including conditioning), DS1 loops, DS3 loops; DS1 transport, and DS3 transport – and whether they do so ubiquitously within the MSA.

When the Commission applies its analytical framework in the retail market, it would examine the level of competition for services competitors typically provide retail customers by using UNE loops. It is logical that the analysis would consider competition for downstream retail services provided via UNE loops separately from wholesale competition for the provision of those inputs. In other words, when applying the analytical framework proposed in these Comments, the Commission should examine retail competition and wholesale competition separately, and, since UNEs are wholesale inputs,

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[121] *TRRO*, 20 FCC Rcd at 2638, ¶ 193 ("most business that cable companies serve, or are likely to serve, are home offices or very small stand-alone businesses, neither of which typically requires high-capacity loop facilities.").

[122] *Id.*

[123] *See AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5676-5727, ¶¶ 27-121; *SBC/AT&T Merger Order*, 20 FCC Rcd 18304-50, ¶¶ 24-107; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18447-93, ¶¶ 24-108.

it should not grant forbearance in any market where the RBOC continues to be dominant in the wholesale market.

2. Separate Analysis of Residential and Business Markets

In considering the different retail product markets competitors serve using UNE loop and transport inputs, the Commission should recognize the substantial differences between residential and business services. The networks, services, features and customer care necessary for competitors to function in business markets, even for very small business customers, is vastly different than that needed to provide residential service.[124] The Commission has recognized these distinctions and has regularly distinguished its competitive analysis for residential and business customers.[125]

In other words, when applying the retail test, residential and business retail product markets should be examined separately with each of the product markets broken down by the retail services that could be provided to these retail customers over UNE loops and transport.

3. Products That Most Consumers Do Not View As A Substitute (*e.g.*, wireless) Are Not In The Same Product Market, Even If A Subset Of Consumers Do Substitute Them

As discussed above, regulatory authorities have found that wireline and wireless services are complementary and not substitutable services and therefore belong in separate product markets, notwithstanding that a certain subgroup of wireline customers have cut-the-cord and are now exclusively using wireless services. In addition, at the present

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[124] Letter from Thomas Jones, Esq., Counsel to One Comm. *et al.*, WC Docket Nos. 08-24 and 08-49, at 13-15 (filed April 14, 2009).

[125] *See, e.g.*, *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5676-5727, ¶¶ 27-121; *SBC/AT&T Merger Order*, 20 FCC Rcd 18304-50, ¶¶ 24-107; *Verizon/MCI Merger Order*, 20 FCC Rcd at 18447-93, ¶¶ 24-108; *TRO*, 18 FCC Rcd at 17109-17182 ¶¶ 209-341; *TRRO*, 20 FCC Rcd at 2641-58 ¶¶ 199-225.

time, wireless service does not provide comparable, or in some cases any, broadband access to the Internet. At most, therefore, wireless continues to be a complement to wireline service, not a substitute for it.[126] If wireless is not a complete substitute for landline service, there is no basis for the Commission to find that the availability of wireless service is sufficient to protect consumers in the absence of unbundling obligations. At bottom, the extent to which consumers have "cut-the-cord" and the extent of competitive alternatives for *voice services alone* from wireless to an RBOC's retail wireline voice services are by no means a barometer of the extent of competitive alternatives to that RBOC's bottleneck loop and transport facilities and all the different and unique services that can be provided over those facilities, and thus should not be considered in the same product market.

Similarly, the Commission need not consider fringe competition from so-called nascent services, such as Wi-Max, fixed wireless or satellite, nor should it consider wireline carriers with negligible market shares that are unlikely to expand outside of an isolated market niche. Although incumbents cry "wolf" at nascent services such as fixed wireless, satellite and broadband over powerline, the market shares of these competitors is infinitesimally small. As the DOJ has recognized, because none of these services has ever been shown to generate a "substantial share" of the market, it is likely that their presence in the market will not impede the ILEC's "ability to raise prices without losing sufficient sales."[127] In addition to their lack of substantial market presence, the lack of

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[126] *See* UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2 ("Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce churn, rather than the next leg in the company's growth.").

[127] *See* DOJ Complaint, ¶ 70.

brand presence by these competitors and the "superior capacity and coverage" of the incumbent networks, renders these "fringe" competitors unlikely to "prevent coordinated pricing or other anticompetitive behavior" likely to occur in a duopoly market.[128]

The DOJ's findings regarding the residential long distance market are equally applicable in the local market. The strength of the brand names of the cable company and the ILEC in their markets, and their superior network capacity and coverage, give them enormous advantages over nascent services and niche wireline competitors, just as WorldCom, AT&T and Sprint possessed enormous advantages over smaller long distance competitors at the time of the DOJ's complaint to block the WorldCom/Sprint merger.

B. The Commission Should Standardize the MSA as the Appropriate Geographic Market for Analyzing the Statutory Forbearance Criteria

The Commission has previously defined a geographic market for purposes of analyzing competition as the market "in which the seller operates, and to which the purchaser can practicably turn for supplies."[129] The Commission should establish the MSA as the appropriate geographic area in which to analyze requests for forbearance filed pursuant to Section 10. This approach would prevent forbearance petitioners from picking and choosing any area, defined by any criteria it wishes, for requesting forbearance, as Verizon attempted to do in Rhode Island and Virginia Beach. Otherwise, forbearance petitioners could potentially seek forbearance for a street, a building, or perhaps the area served by a particular cell site, if it thinks that arbitrary area could meet the market share threshold that the Commission previously applied on an MSA-wide basis. The Commission should therefore insist on the selection of a geographic market that has

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[128] *Id.* at ¶ 71.

[129] *Echostar,* 17 FCC Rcd at 20609, ¶ 117 *citing US v. Grinnell Corp.*, 384 U.S. 563, 588-89 (1966) and *FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989).

a basis rooted in rational economic analysis and then apply the appropriate forbearance test in that market.

An MSA, as determined by the U.S. Bureau of the Census and the Office of Management and Budget ("OMB"), is not a random aggregation of political jurisdictions. It is defined as a metropolitan area comprised of a large population nucleus, together with adjacent communities having a "high degree of social and economic integration[.]"[130] Because an MSA has a high degree of internal economic and social coherence, it is more likely that any estimation of competition, or application of a single competitive test to the entire area, if otherwise accurate, will be correct anywhere in the MSA.

The Commission has found that:

> MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition. Because competitive LECs generally do not enter new markets on a state-wide basis, we reject proposals to define the geographic scope of pricing flexibility on the basis of states or study areas.[131]

And, the Commission found that using MSAs

> appears to meet the requirements of clarity and ease of use. MSAs are precisely defined and easily understood by both technical and non-technical personnel. Equally important, MSA information enjoys wide distribution, is used for many different purposes, and is periodically updated. This attribute is very attractive because it does not require expenditure of any additional resources on the part of the Commission or the industry to implement....[132]

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[130] The most recent OMB definition of metropolitan areas is contained in OMB Bulletin No. 07-01 (Dec. 18, 2006). *See* http://www.whitehouse.gov/omb/bulletins/fy2007/b07-01.pdf.

[131] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14260, ¶ 72 (1999) (citations omitted).

[132] *Definition of Congested Areas in the Broadcast Auxiliary Services and the Cable Television Relay Service*, Notice of Proposed Rulemaking, 5 FCC Rcd 6687, 6687, ¶ 5 (1990).

An MSA, therefore, is reasonable for use as an area in which the Commission may consider forbearance.

To consider forbearance on an area smaller than an MSA, without any valid economic rationale for subdividing the MSA, makes no sense at all. Forbearance in only part of an MSA would likely lead to marketplace dysfunctions because critical economic inputs to competitive telecommunications services would be unavailable in part of an area that otherwise has a high degree of social and economic integration. This could lead to pricing distortions and dislocations within the MSA and potentially result in significant harms including reductions in growth and productivity. As a result of the Commission's error in Omaha, it is apparent that it is not economically feasible for a competitor to provide service in only those wire centers in an MSA to which unbundling forbearance does not apply.[133] Forbearance in pockets of an otherwise cohesive economic unit would constitute undue government interference in marketplace dynamics. The Commission acknowledged related concerns in the *Verizon Six-MSA Forbearance Order.*[134]

V. CONCLUSION

For the foregoing reasons, the Commission should adopt a new forbearance analytical framework that more closely resembles its traditional market power analysis in response to the D.C. Circuit's remand of the Six MSA Order and the Qwest 4 MSA Order.

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[133] Declaration of Pritesh D. Shah, McLeodUSA Telecommunications Services, Inc., July 23, 2007, ¶ 8, attached to Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No, 04-223, filed July 23, 2007.

[134] *Verizon Six-MSA Order*, n.102.

Respectfull y submitted,

/s/

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